IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TUCSON IMAGING ASSOCIATES, LLC, an Arizona limited liability company; and RADIOLOGY, LTD., P.L.C., an Arizona professional liability company, Plaintiffs/Appellants, v. NORTHWEST HOSPITAL, LLC, a Delaware limited liability company; NORTHWEST RANCHO VISTOSO IMAGING SERVICES, LLC, a Delaware limited liability company; and TRIAD HOSPITAL, INC., a Delaware corporation, Defendants/Appellees.	2 CA-CV 2006-0125 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20041068

Honorable Carmine Cornelio, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Plaintiffs/appellants Tucson Imaging Associates, LLC and Radiology, Ltd., P.L.C. (collectively referred to as TIA)[1] appeal from the trial court's grant of summary judgment in favor of Northwest Hospital, LLC (Northwest), Northwest Rancho Vistoso Imaging Services, LLC (NRVIS), and Triad Hospitals, Inc. (Triad) on TIA's breach of contract and breach of covenant of good faith and fair dealing claims. For the reasons expressed below, we affirm.

Factual and Procedural Background

¶2 When reviewing a trial court's decision on a motion for summary judgment, we view the facts and all reasonable inferences from them in the light most favorable to the nonmoving party. *Link v. Pima County*, 193 Ariz. 336, ¶ 12, 972 P.2d 669, 673 (App. 1998). Northwest is the owner and operator of Northwest Hospital (the Hospital), which is located within a complex of medical buildings that the parties refer to as the Northwest Hospital campus. TIA is a provider of magnetic resonance imaging (MRI) and computerized tomography (CT) services. In June 1989, Northwest and TIA entered into an "MRI/CT Service Agreement" that grants TIA the "exclusive right to provide CT and MRI services to

[1]According to TIA's opening brief, Tucson Imaging Associates, LLC is managed by Radiology, Ltd., P.L.C.

inpatients and outpatients of the Hospital."[2] TIA is responsible for acquiring and upgrading the necessary MRI and CT equipment and provides its services from an office that adjoins the Hospital.

¶3 In May 2003, Northwest submitted to Triad, its parent company, a Capital Expenditure Request Packet in which it sought funds to "[e]stablish a CT/MRI Imaging Center located contiguous to the hospital campus." In November 2003, TIA learned of Northwest's plans to build a new imaging facility and sought assurance that it would not provide CT or MRI services, citing TIA's exclusive right under the MRI/CT Service Agreement. Northwest responded that the facility would be located off the Hospital campus and owned by NRVIS and claimed the MRI/CT Service Agreement was inapplicable because "[p]eople who receive MRI/CT services at the new facility would do so as patients of [NRVIS]; not Northwest." Northwest and NRVIS are wholly owned subsidiaries of Triad.

¶4 In April 2004, NRVIS opened the new facility (the Orange Grove facility), which is located on Orange Grove Road. Northwest includes the medical buildings housing the Orange Grove facility on its map of the Northwest Hospital campus. Persons who call the Northwest Hospital Central Scheduling Office to schedule an MRI or CT scan are asked

[2]The agreement was in fact executed by Hospital Corporation of Northwest, Inc., Northwest's predecessor in interest, and Northwest Diagnostic Imaging Limited Partnership, Ltd., TIA's predecessor in interest. For convenience, we refer only to "Northwest" and "TIA."

if they are patients of Northwest Hospital and, if they respond in the negative, they are referred to the Orange Grove facility.

¶5 In April 2005, TIA filed a Third Amended Complaint against Northwest, NRVIS, and Triad, alleging breach of contract and breach of covenant of good faith and fair dealing. TIA sought declaratory relief, specific performance of the MRI/CT Service Agreement, and to enjoin the appellees from "owning, operating, participating in or otherwise enjoying any benefit of any kind or nature whatsoever associated with the [Orange Grove facility]." In August 2005, Northwest, NRVIS, and Triad moved for summary judgment on the ground that TIA "cannot identify a single Hospital inpatient or outpatient who has received (or will receive) . . . [MRI] services or . . . [CT] scans at [NRVIS's] off-campus Orange Grove [facility]." In April 2006, the trial court granted the motion, and this appeal followed.

Discussion

¶6 TIA contends the trial court erred in granting summary judgment on its claims for breach of contract and breach of covenant of good faith and fair dealing. We review the court's grant of summary judgment *de novo*. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). We will affirm only if no genuine dispute exists regarding the material facts and the appellees are entitled to judgment as a matter of law. *Id*. ¶ 13; *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

I. Breach of Contract

¶7 The relevant provision of the MRI/CT Service Agreement provides that TIA "shall be the exclusive provider of CT and MRI services for inpatients and outpatients of the Hospital." In its complaint, TIA did not allege Northwest had used an MRI/CT provider other than TIA for patients receiving treatment at Northwest Hospital. Rather, it claimed "[b]oth parties to the MRI/CT Service Agreement intended and understood that . . . Northwest would not compete with TIA for the provision of MRI/CT services on the hospital campus," that "[t]here is a unity of interest and ownership between [appellees] such that the separate personalities of Northwest, NRVIS, and Triad cease to exist and [appellees] are alter egos or business conduits of one another," and that appellees had improperly competed for the provision of MRI and CT services on the Hospital campus through NRVIS's construction of the Orange Grove facility. In granting appellees' motion for summary judgment, the trial court found there was "no evidence that [the appellees'] actions violate the agreement at issue."

A. Northwest Hospital Campus

¶8 On appeal, TIA reasserts that the parties to the agreement intended that TIA would be the "exclusive provider of both MRI and CT scans for the Northwest Hospital campus." In interpreting an agreement, we must attempt to determine and give effect to the intention of the parties at the time the agreement was made, if at all possible. *See Powell v. Washburn*, 211 Ariz. 553, ¶ 13, 125 P.3d 373, 376 (2006). Below, TIA offered several pieces of extrinsic evidence to support this claim, but the trial court refused to consider

them, finding they had been "offered to directly contradict the plain terms [of the agreement]." TIA now contends the court erred in refusing to consider the extrinsic evidence to determine the parties' intent. We review the court's decision *de novo*. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 5, 32 P.3d 39, 42 (App. 2001).

1. Ambiguity

¶9 Generally, extrinsic evidence is admissible to clarify and explain ambiguity in the language of a contract. *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, ¶ 12, 132 P.3d 825, 828 (2006). TIA claims the term "the Hospital" is ambiguous and that extrinsic evidence demonstrates the parties' intent to define the term as "the Hospital campus."[3] As appellees point out, however, the agreement clearly states that "the Hospital" refers to "Northwest Hospital in Tucson, Arizona." The word "campus" is not used anywhere in the agreement. "Hospital" is commonly defined as an "institution that provides medical or surgical care and treatment for the sick and injured." *American Heritage Dictionary* 624 (2d coll. ed. 1982). A map of the Northwest Hospital campus shows Northwest Hospital is not the only institution on the Hospital campus that provides medical care.[4] And there is no evidence in the record to suggest these other institutions are part of

[3]Although appellees claim TIA has waived this argument by failing to raise it below, the record shows TIA raised it in its response to Northwest's motion for summary judgment.

[4]According to a map of the Hospital campus included in TIA's separate statement of facts in opposition to appellees' motion for summary judgment, other on-campus medical institutions include, *inter alia*, HealthSouth Rehabilitation Hospital, Desert Life Rehabilitation & Care Center, Sonora Behavioral Health Hospital, and Desert Cardiology.

Northwest Hospital. It would make little sense to interpret the agreement to grant TIA the exclusive right to provide MRI and CT services to the inpatients and outpatients of these other institutions merely because they are located on the Hospital campus. TIA's proposed interpretation of "the Hospital," however, would require such a result.

¶10 Moreover, "[i]n determining the parties' intent to an agreement, . . . the entire agreement must be reviewed and construed as a whole." *Lake Havasu Resort, Inc. v. Commercial Loan Ins. Corp.*, 139 Ariz. 369, 376, 678 P.2d 950, 957 (App. 1983). Other provisions of the agreement reflect the parties' intent to limit TIA's exclusive right to the Northwest Hospital building. For example, paragraph six provides: "[TIA] covenants to maintain one office in the Northwest Hospital Medical Plaza, which is immediately proximate to Northwest Hospital." A map of the Hospital campus shows the Northwest Medical Plaza is "on" the Hospital campus—but it is "immediately proximate" to the Hospital building.[5] Paragraph five refers to Northwest's obligation to make employees available "*in* the Hospital," and this preposition would not likely be used if "the Hospital" referred to the Hospital campus. (Emphasis added.) Furthermore, paragraph thirteen states that TIA shall direct its communications with Northwest to "6200 North La Cholla

[5]In its opening brief, TIA claims that "'the Hospital' . . . plainly isn't limited to just patients being treated inside the physical confines of the Northwest Hospital building itself, since TIA's imaging center is in a separate building." We see no inconsistency, however, with the agreement granting TIA the exclusive right to provide CT and MRI services to patients of the Northwest Hospital building but permitting TIA to provide such services in an adjacent building.

Boulevard," which the record indicates is the address for the Northwest Hospital building. On the other hand, there are no provisions of the agreement that suggest "the Hospital" refers to the Northwest Hospital campus. Accordingly, the trial court did not err in finding that the term "the Hospital" unambiguously refers to the building or buildings that comprise Northwest Hospital, not the entire Northwest Hospital campus.[6]

2. Reasonably Susceptible

¶11 TIA further argues the trial court erred because the parol evidence TIA offered "supplemented the contract terms but did not contradict it." It is true that "contract ambiguity is not the only linchpin of a court's decision to admit parol evidence." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993). Such evidence may also be admitted "to determine the intention of the parties if 'the judge . . . finds that the contract language is "reasonably susceptible" to the interpretation asserted by its proponent.'" *Johnson*, 212 Ariz. 381, ¶ 12, 132 P.3d at 828, *quoting Taylor*, 175 Ariz. at 154, 854 P.2d at 1140. Whether contract language is "reasonably susceptible to more than one interpretation so that extrinsic evidence is admissible is a question of law for the court." *In re Estate of Lamparella*, 210 Ariz. 246, ¶ 21, 109 P.3d 959, 963 (App. 2005).

¶12 As our supreme court stated in *Taylor*, "[s]ome words are clear beyond dispute." 175 Ariz. at 155 n.2, 854 P.2d at 1141 n.2. In such cases, extrinsic evidence that

[6]It is unclear from a map of the Hospital whether it is comprised of one or two buildings. For convenience, we will refer to "the Northwest Hospital building."

purports to show the word means other than its clear meaning can only vary or contradict the terms of the contract; the agreement is not reasonably susceptible to such an interpretation, and the extrinsic evidence is inadmissible. *See id.; see also Higginbottom v. State*, 203 Ariz. 139, ¶ 12, 51 P.3d 972, 975 (App. 2002). We find the meaning of "the Hospital" is clear beyond dispute, and extrinsic evidence demonstrating the parties' intent that it means "the Hospital campus" varies and contradicts the plain terms of the agreement. Even had the trial court considered the extrinsic evidence, however, it would not have altered the result.

¶13 TIA first presents a Right of First Refusal Agreement (RFR) that the parties executed the same day as the MRI/CT Service Agreement.[7] Substantially contemporaneous documents may be read together to determine the nature of the transaction. *Childress Buick Co. v. O'Connell*, 198 Ariz. 454, ¶ 9, 11 P.3d 413, 415 (App. 2000). The RFR "set forth [the parties'] understanding as to future off-campus radiology services in the vicinity of Northwest Hospital." It provided that if either party determined to provide radiology services within the defined service area, which included much of northwest Tucson, that party was required to notify the other of its plans and provide it the opportunity to participate in the endeavor. The RFR specifically did not apply, however, to "Radiology

[7]Paragraph two of the RFR provides: "This Agreement shall terminate upon the . . . termination of . . . the Radiology Agreement dated as of July 20, 1984 between [Northwest] and [TIA]." The Radiology Agreement, which granted TIA the exclusive right to staff the Hospital's radiology department, was terminated in November 1997.

Services on the presently-existing campus real estate (or on subsequently-acquired real estate actually adjoining therewith) of Northwest Hospital."

¶14 TIA contends the RFR excluded from its coverage the Hospital campus, and any future expansion of that campus, because the parties understood the MRI/CT Service Agreement had already established TIA as the exclusive provider of radiology services for this area.[8] It argues the RFR, therefore, demonstrates the parties' intent in the MRI/CT Service Agreement to define "the Hospital" as the Northwest Hospital campus as it existed in June 1989 or any "subsequently-acquired real estate," which would include the Orange Grove facility.

¶15 As appellees point out, this argument conflates the RFR and MRI/CT Service Agreement and confuses their purposes. The RFR expressly applied to a wholly separate interest in potentially providing radiology services in the general vicinity beyond the Hospital campus. Contrary to TIA's assertion, the most straightforward explanation for the exclusion of the campus, and any future expansion of the campus, from the RFR's provisions is that the parties bargained for the right of either party or its affiliates to provide radiology services within the diverse medical complex where the hospital was situated without having

[8]We reject Northwest's claim in its answering brief that the parties excluded the Hospital campus area from the RFR because TIA already had the exclusive right to provide radiology services within this area under the Radiology Agreement, discussed in footnote seven above. The Radiology Agreement granted TIA the right to provide professional services at the Hospital, that is, to staff the Hospital's radiology department. The exception in the RFR, however, pertains to "radiology services," which it defines as "diagnostic imaging service[s], other than professional services."

to inform or include the other. There is nothing in the RFR that suggests the parties intended its language to apply to the terms of the MRI/CT Service Agreement. Likewise, there is no provision in the MRI/CT Service Agreement that incorporates any portion of the RFR. Indeed, paragraph thirteen of the MRI/CT Service Agreement specifically provides that it "supersedes any prior agreement or understanding among the parties and may not be modified or amended in any manner."

¶16 Moreover, paragraph one of the RFR refers to both "Northwest Hospital[,] located at 6200 North La Cholla in Tucson, Arizona" and the "campus . . . of Northwest Hospital." This suggests that, on the same day the parties executed the MRI/CT Service Agreement, they agreed that "the Hospital" referred to the building "located at 6200 North La Cholla" and distinguished "the Hospital" from the Hospital "campus." That the MRI/CT Service Agreement refers only to "the Hospital" demonstrates the parties' intent that its terms apply only to the Hospital itself.

¶17 TIA next contends that internal documents from Northwest, created before the instant litigation, "show[] that its own officials understood . . . that TIA's exclusive right agreement extended to the entire hospital 'campus.'" TIA points to a Capital Expenditure Request Packet that Northwest submitted to Triad in May 2003, which set forth Northwest's initial proposal for constructing the Orange Grove facility. The Capital Expenditure Request Packet states: "[TIA] is the sole provider of outpatient CT/MRI services for the hospital campus," and "[w]e lack the ability to schedule patients . . . and actually have to refer

business to [TIA] for those patients that want to go to the main campus." In a later submission to Triad, Northwest stated that it "does not have a CT/MRI on its campus and uses [TIA] as the sole provider of inpatient & outpatient CT/MRI services."

¶18 At oral argument, TIA asserted that we must view these statements in the light most favorable to TIA, and it contends they demonstrate Northwest's understanding that TIA had the exclusive right to provide CT and MRI services for the entire Northwest Hospital campus. Contrary to TIA's assertion, however, we review the trial court's decision to exclude the evidence *de novo*, *see 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 5, 32 P.3d at 42, and must therefore determine whether the agreement is "'reasonably susceptible'" to TIA's proposed interpretation, *Johnson*, 212 Ariz. 381, ¶ 12, 132 P.3d at 828, *quoting Taylor*, 175 Ariz. at 154, 854 P.2d at 1140. We find it is not. There is no evidence the statements were anything other than Northwest's practical assessment of the availability of CT and MRI services on the Hospital campus at the time, that is, that TIA was in fact the only, or at least the most accessible, provider of CT and MRI services on the Hospital campus, and Northwest would "have to refer" its patients to TIA if they wanted to remain on campus for those services. These statements do not necessarily establish Northwest believed TIA had a contractual right to be the sole provider of CT and MRI services on the Hospital campus, as TIA claims.

¶19 Northwest also stated in the Capital Expenditure Request Packet that the Orange Grove facility would be located "outside of the non-compete hospital campus zone

identified in the contract [Northwest] signed with [TIA]." TIA claims this demonstrates Northwest's understanding that the MRI/CT Service Agreement prohibited Northwest from competing with TIA for the provision of CT and MRI services on the hospital campus. Appellees point out, however, that this statement referred to a separate agreement between Northwest and TIA, the Professional Services Agreement (PSA), not the MRI/CT Service Agreement.

¶20 The PSA, executed in July 1998, grants TIA the exclusive right to "staff the Radiology Departments on the [Northwest Hospital] campus." "Campus" is defined in the PSA as the area "bounded on the west by North La Cholla Boulevard, on the east by Corona Drive, on the north by West Orange Grove Road and on the South by West Rudasill Road." The Orange Grove facility is not located on the "campus" as defined in the PSA, lying just west of North La Cholla Boulevard on Orange Grove Road. Had the Orange Grove facility been constructed on the Hospital campus, however, Northwest would have been prohibited from competing with TIA for the staffing of that facility. We agree with Northwest that the statement merely reflected its desire to avoid that result and to staff the facility with its own employees.

¶21 Lastly, TIA presented the deposition testimony of Dr. Donald Jeck, TIA's managing partner at the time the MRI/CT Service Agreement was executed. Jeck testified that "the intent of [the MRI/CT Service A]greement . . . was that [TIA] should have the exclusive right to provide the MRI and CT services on the campus as defined or any

subsequent expansion, because a campus is a plastic entity."[9] TIA contends that Jeck's testimony was given credence by a map of the Northwest Hospital campus, published by Northwest, that shows the Orange Grove facility as part of the campus.

¶22 As discussed earlier, the MRI/CT Service Agreement does not define, or even mention, the Hospital campus. Jeck was apparently referring to the definition of "campus" found in the PSA. Jeck's testimony, however, contradicts both the plain terms of the MRI/CT Service Agreement and the definition of "campus" found in the PSA, which does not provide for any "subsequent expansion" of the campus. *See Higginbottom*, 203 Ariz. 139, ¶ 12, 51 P.3d at 975 (parol evidence rule prohibits use of extrinsic evidence to vary or contradict written contract). And there is nothing in the record to suggest that Northwest's map of the Hospital campus evinces the parties' intent in the MRI/CT Service Agreement, or that it is other than a guide for persons visiting the campus.

¶23 In sum, we find the relevant provision of the MRI/CT Service Agreement plain and unambiguous. It grants TIA the exclusive right to provide CT and MRI services to inpatients and outpatients of "the Hospital," not the Hospital campus. We note that, had the parties intended the agreement to cover the Hospital campus, terms to that effect could

[9]In its opening brief, TIA includes several quotations from Jeck's deposition testimony that are not included in the record on appeal. We do not consider any evidence not contained in the record. *Ness v. Western Sec. Life Ins. Co.*, 174 Ariz. 497, 500, 851 P.2d 122, 125 (App. 1992).

have readily been included in its provisions.[10] The agreement is not reasonably susceptible to TIA's proposed interpretation, which contradicts and varies its plain terms. *See Long v. City of Glendale*, 208 Ariz. 319, ¶ 29, 93 P.3d 519, 528 (App. 2004) ("the court must preclude admission of any extrinsic evidence or argument that would actually vary or contradict the meaning of the written words"); *see also Taylor*, 175 Ariz. at 155, 854 P.2d at 1141 (same).

¶24 Moreover, we note that the agreement was formed at arms length by sophisticated parties. Under such circumstances, we are especially loath to look beyond the agreement's plain terms and to consider parol evidence to determine the parties' intent. *See Pinnacle Peak Developers v. TRW Inv. Corp.*, 129 Ariz. 385, 393, 631 P.2d 540, 548 (App. 1980) ("The application of the parol evidence rule moves along a continuum based on the extent of the contradiction and the relative strength and sophistication of the parties and their negotiations."); *see also Taylor*, 175 Ariz. at 158, 854 P.2d at 1144 (courts may infer that sophisticated parties include in a contract the terms they intend). And we are further confined to the actual terms of the agreement in light of its integration clause, which provides that the agreement "supersedes any prior agreement or understanding among the

[10]The parties' ability to contract for rights that extend to the Hospital campus was demonstrated in both the RFR and the PSA. And the agreement that preceded the MRI/CT Service Agreement, the CAT Scanner Agreement, provided: Northwest "agrees (a) not to compete with [TIA's] provision of [CAT scanning] services . . . at Northwest and (b) to exclusively use such services . . . at Northwest for its patients." The MRI/CT Service Agreement does not contain a similar non-compete clause, much less one that extends to the Hospital campus.

parties and may not be modified or amended in any manner." *See Thomas v. Goudreault*, 163 Ariz. 159, 167, 786 P.2d 1010, 1018 (App. 1989) ("The parol evidence rule prevents the use of evidence of prior or contemporaneous oral agreements to vary, contradict or enlarge a fully integrated, written agreement.").

3. Alter Ego or Business Conduit

¶25 TIA next argues that the Orange Grove facility is indeed part of Northwest Hospital because NRVIS, which owns the Orange Grove facility, is merely an alter ego or business conduit of Northwest. TIA offers extensive evidence of such a relationship, including the fact that Northwest and NRVIS are both wholly owned subsidiaries of Triad; Northwest's chief executive officer (CEO) at the time originated the idea for the Orange Grove facility; Northwest submitted the request for funds for the Orange Grove facility to Triad; Northwest entered into several construction contracts for the Orange Grove facility; Northwest manages the Orange Grove facility and leases it to NRVIS; Northwest's CEO signed the lease agreement for the Orange Grove facility on behalf of both Northwest and NRVIS; NRVIS does not have an independent bank account and deposits funds directly into Northwest's account; appointments for the Orange Grove facility are scheduled through Northwest's Central Scheduling Office; there was a unity of control between NRVIS's and Northwest's corporate officers at the time the Orange Grove facility was constructed; and only Northwest employees staff the Orange Grove facility. At oral argument, TIA asserted that, because the Orange Grove facility is an outpatient facility that is staffed by Hospital

employees, a reasonable juror could find that outpatients of the Orange Grove facility are in fact "outpatients of the Hospital."

¶26 We need not address whether NRVIS is an alter ego or business conduit of Northwest. The agreement grants TIA the exclusive right to provide CT and MRI services to "the Hospital"; it contains no provision that indicates TIA's exclusive right extends to every business endeavor that Northwest undertakes. The agreement clearly would have no application, for example, if Northwest were to construct and operate an imaging center in southeast Tucson. Indeed, the record suggests that, since NRVIS was formed in August 2000, it has also operated a radiological imaging center in the Rancho Vistoso area of Tucson. TIA limits its alter ego/business conduit argument to the Orange Grove facility, however, and does not contend that it has an exclusive right to provide MRI and CT services to NRVIS's patients at the Rancho Vistoso location. Thus, assuming *arguendo* that NRVIS is an alter ego or business conduit of Northwest, the fact remains the Orange Grove facility is not part of "the Hospital" but is a separate business endeavor, and patients of the Orange Grove facility are not "inpatients or outpatients of the Hospital."

B. Northwest's Duty to Refer Persons to TIA

¶27 TIA further contends that the parties to the MRI/CT Service Agreement intended that the Hospital would refer to TIA any person over whom it had "influence" and the agreement was therefore breached when the Northwest Hospital Central Scheduling Office referred persons to the Orange Grove facility.

¶28 The agreement itself does not mention that Northwest has a duty to refer persons to TIA, and paragraph three specifically provides that "[Northwest] does not control the referrals of physicians on its medical staff." But TIA maintains that the parties understood such a duty to exist and points to the Capital Expenditure Request Packet, in which Northwest stated: "We lack the ability to schedule patients at either location and actually *have to refer* business to [TIA] for those patients that want to go to the main campus." (Emphasis added.) As observed earlier, however, this statement merely shows that, at the time, TIA was in fact the only, or most accessible, provider of radiology services on the Hospital campus, and if a patient wished to remain on-campus for those services, Northwest would "have to refer" that person to TIA; that is, Northwest's referral to TIA was necessary as a practical matter, not as a contractual obligation. Moreover, as noted above, we are reluctant to consider extrinsic evidence offered to vary or augment the terms of an agreement negotiated at arms length, especially one between sophisticated parties. *See Pinnacle Peak Developers*, 129 Ariz. at 393, 631 P.2d at 548; *see also Taylor*, 175 Ariz. at 158, 854 P.2d at 1144.

C. Outpatients

¶29 Lastly, TIA argues that those persons that TIA referred to the Orange Grove facility were in fact "outpatients of the Hospital" because an "outpatient" is one who has contact with or is influenced by the Hospital. In support of its argument, TIA again turns to Jeck's deposition testimony, in which he stated the parties understood that "outpatients,

basically, are any patient that the hospital has coming to it or has any potential influence or possibility of referral. Basically, any possible contact with the hospital or hospital-related entities with patients." Similarly, Dr. Donald Tempkin, President of TIA when the MRI/CT Service Agreement was executed, testified at his deposition that "[t]he outpatients are all those patients who come to the hospital for services and over whom the hospital has some influence."

¶30 The agreement does not define "outpatient," but "outpatient" is commonly defined as a "patient who receives treatment at a hospital or clinic without being hospitalized." *American Heritage Dictionary* 883 (2d coll. ed. 1982); *see also The Merriam Webster Dictionary* 370 (1995) (defining "outpatient" as "a patient who visits a hospital or clinic for diagnosis or treatment without staying overnight"). Indeed, as Tempkin later clarified in his deposition, "outpatients are all those patients who come to the hospital for medical services." Under TIA's proposed definition, an outpatient need not receive any treatment from the Hospital, but merely ask for a referral. There is no objective evidence to support TIA's contention that the parties intended such a broad and unconventional definition of "outpatient," and we reject the argument. *See Horton v. Mitchell*, 200 Ariz. 523, ¶ 17, 29 P.3d 870, 874 (App. 2001) ("'The controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable.'"), *quoting Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993).

II. Breach of Covenant of Good Faith and Fair Dealing

¶31 Finally, TIA contends that "even if the evidence didn't justify a factfinder concluding that Northwest breached the 1989 MRI/CT Agreement . . . a factfinder could still find that Northwest's actions relating to the Orange Grove facility breached the covenant of good faith and fair dealing." Appellees claim TIA has waived this argument by failing to raise it below.

¶32 Generally, "'[a] party must timely present [its] legal theories to the trial court so as to give the trial court an opportunity to rule properly.'" *Airfreight Exp. Ltd v. Evergreen Air Center, Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238 (App. 2007), *quoting Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970). Although TIA alleged breach of covenant of good faith and fair dealing in its complaint and in its initial disclosure pursuant to Rule 26.1, Ariz. R. Civ. P., 16 A.R.S., Pt.1, it failed to meaningfully address the issue in opposition to appellees' motion for summary judgment; it merely attached its Rule 26.1 disclosure to its brief. The court, therefore, did not have any reason to address this claim, and we agree with appellees that TIA has waived the argument on appeal. *See Airfreight Exp.*, 215 Ariz. 103, ¶ 17, 158 P.3d at 238 ("[T]he [trial] court must have had the opportunity to address the issue on its merits.").

Disposition

¶33 In sum, the trial court did not err in concluding the plain language of the MRI/CT Service Agreement grants TIA the exclusive right to provide MRI and CT services

to inpatients and outpatients of Northwest Hospital; its exclusive right does not extend to the Hospital campus, prevent Northwest from competing with TIA for the provision of CT and MRI services on or near the Hospital campus, or require the Hospital to refer all persons to TIA. And TIA has presented no evidence that the Hospital has used an MRI/CT provider other than TIA for its patients. Accordingly, we affirm the trial court's grant of summary judgment in favor of appellees.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge